No. 75-1858

In the Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOCAL 14055, UNITED STEELWORKERS OF AMERICA, AFL-CIO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-19a)[1] is reported at 524 F.2d 853. The deci-

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[1] "Pet. App." references are to the appendices to the petition for a writ of certiorari in No. 75-1521, which was filed by the Dow Chemical Company on April 22, 1976, and which

sion and order of the National Labor Relations Board (Pet. App. D, pp. 26a-51a) are reported at 211 NLRB 649.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, pp. 20a-21a) was entered on January 15, 1976. Timely petitions for rehearing and rehearing *en banc* were denied on February 4, 1976 (Pet. App. C, pp. 22a-25a). On April 29, 1976, the Chief Justice extended the time in which to file a petition for a writ of certiorari to and including June 3, 1976; and on May 26, 1976, the Chief Justice further extended the time to and including July 3, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether consumer picketing by a labor union at the premises of a neutral retailer, directed at the product of a firm with whom the union is in dispute, is forbidden by Section 8(b)(4)(ii)(B) of the National Labor Relations Act when the predictable result of the picketing, if successful, will be to persuade the retailer's customers to cease dealing with him altogether.

STATUTE INVOLVED

Section 8(b) of the National Labor Relations Act, 61 Stat. 136, as amended, 29 U.S.C. 158(b), provides in relevant part:

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seeks review of the same judgment that we seek review of here.

It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4)(ii) to threaten, coerce, or restrain any person engaged in commerce, or in an industry affecting commerce, where in either case an object thereof is—

* * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * * *

STATEMENT

1. On February 6, 1972, respondent Local 14055, United Steelworkers of America, AFL-CIO (the "Union"), struck the Bay Refining Division of the Dow Chemical Company in Bay City, Michigan (Pet. App. D, p. 29a; A. 119, 259).[2] Following a meeting at which the union membership explored ways in which pressure might be brought to bear on Dow (A. 162-164), the Union on numerous occasions be-

[2] "A." refers to the appendix in the court of appeals, a copy of which has been lodged with the Clerk of this Court. "C.C. Exh." refers to exhibits introduced in the proceedings before the Board by the Chamber of Commerce of the United States.

tween March 11 and April 7, 1973, picketed six retail gasoline stations (operated by three different companies) that marketed Bay gasoline. Signs carried by the pickets proclaimed "Don't Buy Bay Gas," or an equivalent message (Pet. App. D, p. 29a n. 3; A. 35, 46, 114, 117, 133, 175-176, CC. Exh. 16(a)-(e), 17(a)-(d), 18(a)-(c)).[3] Both Dow and the Chamber of Commerce of the United States thereupon filed unfair labor practice charges with the National Labor Relations Board (the "Board"). The Board's General Counsel issued a complaint and, with the consent of the parties, the case proceeded directly to the Board on a stipulated record, without a hearing before an Administrative Law Judge.

2. Relying on undisputed facts, the Board found that each of the picketed companies—Rupp Oil Company, Central Michigan Petroleum, Inc., and Harold Alexander, Inc.—leases its stations and rents some equipment from Dow (Pet. App. D, pp. 29a-32a), but otherwise conducts its operations independently of Dow (Pet. App. D, pp. 29a-30a, 33a-34a; A. 21, 75). With regard to labor relations, for example, the record shows that each company establishes its own policies concerning hiring, firing, methods of pay, work rules, and work assignments (A. 18-19, 33-34, 72). None of the companies interchanges employees with Dow, and none of the companies' em-

[3] Other signs stated "Don't Buy Bay," "Boycott Bay Gas," or "Bay Gas Made By Scabs." Some also stated "On Strike Against Dow Only," and "Dow Chemical Unfair." Others did not mention Dow. (A. 133, 175-176; C.C. Exh. 17(a)-(d).)

ployees are eligible for Dow's fringe benefits (A. 19, 34, 72).

Rupp Oil operates three retail gas stations in Bay City. The Board found that sales of Bay gas accounted for between 81 and 86 percent of the gross revenues of one of them, and for 85 percent of the gross revenues of another (Pet. App. D, pp. 31a-32a; A. 31-33). During the limited period that the third station had been in operation by the time the record was made, Bay gasoline sales had totaled $39,000 out of a gross revenue of $40,000 (*ibid.*). All three Rupp stations are identified by prominent "Bay" insignia, including the legend "Bay Gas" on the gas pumps (Pet. App. D, p. 30a; A. 151).

The Board found that Central Michigan began operating two gas stations in Midland, Michigan, in December 1972; that both stations are identified by "Bay" insignia; that sales of Bay gas and oil and other Dow products, such as radiator sealer, brake fluid, and windshield solvent, have accounted for 91 percent of the gross revenues of one of the stations; and that sales of Bay gas and oil have accounted for 98 percent of the gross revenues of the other (Pet. App. D, pp. 31a-32a; A. 13-23).

Alexander operates a retail gasoline and tire business in Bay City. The gas station is identified by a "Bay" sign and gas pumps, and, although Alexander at times sells other gasoline brands, no signs indicate their availability (Pet. App. D, p. 32a; A. 109, 254-255, 267). During the period October 1, 1970 to September 30, 1972, the station had gross revenues

of $1,200,000, of which 60 to 65 percent came from sales of Bay gasoline (A. 73, 76, 101). From October 1, 1972, through April 30, 1973, Alexander's gross revenues were about $710,000, of which $470,000 (60 to 70 percent) came from sales of gasoline and diesel fuel; during this period Alexander sold some gasoline other than Bay, but it is unclear what proportion of total gas sales this represented (Pet. App. D, p. 32a; A. 73, 101-102).

3. The Board concluded that the gas station operators were neutrals in the dispute between Dow and the Union, rather than "allies" of or "joint employers" with Dow, and that the picketing was unlawful under Section 8(b)(4)(ii)(B) since it was "reasonably calculated to induce customers not to patronize the neutral parties * * * at all" (Pet. App. D, pp. 33a-34a, 36a). In the Board's view, the predictability of its impact distinguished this consumer picketing from that held lawful in *National Labor Relations Board* v. *Fruit and Vegetable Packers, Local 760*, 377 U.S. 58 (*"Tree Fruits"*), where this Court ruled that Section 8(b)(4)(ii)(B) permits a union to engage in consumer picketing at the site of a secondary employer "directed only at the struck product," but outlaws "a union appeal to the public at the secondary site not to trade at all with the secondary employer" (377 U.S. at 63). Although in the present case the Union's secondary-site picketing was limited to Dow's products, the Board determined (Pet. App. D, pp. 35a-37a) that it would "threaten, coerce, or restrain" the gas station operators in vio-

lation of Section 8(b)(4)(ii)(B) since "by the nature of the business and of the picketing it is likely that customers who are persuaded to respect the picket signs will not trade at all with the neutral part[ies] * * *." The Union was ordered to cease its unlawful conduct.[4]

4. The court of appeals acknowledged (Pet. App. A, p. 16a) that "[t]he Board's position has its persuasiveness" but nonetheless set aside its order. The court ruled (*id.* at 8a) that the Board had failed "to accord to peaceful picketing, directed to a struck [product] which is marketed at a secondary site, the favorable consideration to which it is entitled under *Tree Fruits* in determining both the object of the picketing under section 8(b)(4) and the duress the section tolerates in the circumstances of this case."

In the court's view (*id.* at 15a), the rationale of *Tree Fruits* does not turn on "differences in the degree of the possible economic impact upon the secondary," but extends to all cases in which the object of the union's appeal can be said to be limited to the struck product, regardless of the economic effect or coercion upon the secondary. Thus, since the Union here requested the public not to purchase Bay gasoline, but did not ask the public "to abstain from all trade with the gas station[s]" (*id.* at 16a), the court

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[4] Two members of the Board dissented on the ground that the picketing was lawful since it was directed only at the struck product (Pet. App. D, pp. 40a-50a).

held that the picketing was not unlawful under Section 8(b)(4)(ii)(B). The court also observed (*id.* at 18a-19a) that its interpretation of the *Tree Fruits* decision allowed it to avoid the First Amendment issue that it said would have been posed had the Board's decision been upheld.

Petitions for rehearing *en banc* filed by intervenors Dow Chemical Company and the Chamber of Commerce were denied, with four judges dissenting (Pet. App. C, pp. 24a-25a).

REASONS FOR GRANTING THE WRIT

This case resembles *Tree Fruits* in that the Union's appeal is in terms directed to the struck product. It is starkly different, however, in that the picketing here, if successful, would cause consumers to cease dealing with the neutral secondary altogether. The similarity is incidental, the difference, critical. By holding that a union's consumer picketing is permissible whenever it is directed only at the struck product, the court of appeals has disregarded the determination in *Tree Fruits* that secondary picketing that cuts off all of the neutral's trade, damages his business generally, and forceably enlists him on the union's side in the dispute with the primary employer, is precisely the kind of union conduct Congress intended to proscribe in Section 8(b)(4)(ii)(B). The decision below also conflicts with other court of appeals decisions, and the question presented is a recurring one of importance to the administration of the National Labor Relations Act.

1. The union in *Tree Fruits* picketed neutral Safeway stores to persuade Safeway's customers to boycott apples in support of the union's primary dispute with apple packers and distributors (377 U.S. at 59-61). Rejecting the Board's ruling that all such secondary picketing was illegal *per se* (132 NLRB 1172), and the court of appeals' view that only secondary picketing that in fact caused the neutral substantial economic injury was prohibited (308 F.2d 311), this Court determined (377 U.S. at 63) that in enacting Section 8(b)(4)(ii)(B) Congress had meant to outlaw peaceful consumer picketing at secondary sites whenever it was employed "to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or put pressure on, the primary employer." This sort of prohibited activity, said the Court (*id.* at 70), was "poles apart from such picketing which only persuades [the neutral's] customers not to buy the struck product" and which confines the union's appeal to the public to its dispute with the primary employer.

The facts of *Tree Fruits* were amenable to incisive distinction between picketing limited to the struck goods and picketing aimed at the secondary's patronage generally. Apples occupy but a small portion of Safeway's retail shelves, and the union could urge Safeway's customers to refrain from buying them without asking that they cease trading with Safeway altogether. But *Tree Fruits* did not hold, as the court below seems to have believed, that struck prod-

uct picketing can never transgress Section 8(b)(4)(ii)(B). The critical inquiry under *Tree Fruits* is whether, considering all the circumstances, the union's conduct amounts to the "isolated evil" Congress feared—picketing used "to cut off the business of a secondary employer as a means of forcing him to stop doing business with the primary employer" (377 U.S. at 68). Picketing having such an object is unlawful, whether or not it also happens to be limited in terms to the struck product.

Separating the permissible from the prohibited in some cases will doubtless call for a careful weighing by the Board of disputed factual contentions. By contrast, the approach of the court below would simplify that inquiry by focusing it solely on the language of the picket signs, but in doing so would fail to achieve Congress' will as elucidated in *Tree Fruits*. In struck product cases it is the Board's duty, subject to judicial review, to determine whether the union's conduct in effect amounts to an appeal to consumers "not to trade at all with the secondary employer," thereby generating "pressure designed to inflict injury on his business generally" and creating "a separate dispute" with him, in violation of Section 8(b)(4)(ii)(B) (377 U.S. at 72). See *National Labor Relations Board* v. *Twin Cities Carpenters District Council*, 422 F.2d 309, 314 (C.A. 8); *Hoffman* v. *Cement Masons Union Local 337*, 468 F.2d 1187, 1192 (C.A. 9).

The court of appeals' *per se* approach to Section 8(b)(4)(ii)(B) would require in this case the very

result Congress meant to avoid. The Union's picketing, while strictly speaking limited to the struck goods, in practical and predictable effect was aimed at cutting off all or nearly all of the business of the neutral secondaries. The retailers are identified to the public as "Bay" gas stations, consumers normally purchase a station's other products only in connection with the purchase of gasoline, and whatever non-Bay products the stations might typically sell incidentally to sales of gasoline would not likely be purchased if potential customers heeded the Union's appeal. On these facts the Board's determination (Pet. App. D, p. 36a) was sound: the picketing was "reasonably calculated" to induce customers not to patronize the neutral parties at all, with the predictable result, if successful, of forcing them to abandon Dow in favor of a new source of supply.[5] That the picketing here is designed to accomplish the evil Congress meant to forbid critically distinguishes it from that sanctioned in *Tree Fruits*, and the similarity relied on by the court of appeals—that in both cases the picketing was directed at the struck product—is by contrast insignificant.

2. The decision below conflicts with *American Bread Company* v. *National Labor Relations Board*, 411 F.2d 147 (C.A. 6). There the struck product was bread and the secondary employers were neutral drive-in restaurants and other eating places. The

[5] The Union must, of course, be deemed to have intended this result. See *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 45.

court looked "not to the supposed form, but to the reality of the picketing" (*id.* at 154) and upheld the Board's determination that the union's picketing violated the Act. In *Tree Fruits*, the court noted, "the consumers could continue their normal shopping and still sympathize with the Union by refraining from the purchase of Washington State apples," whereas, in the case before it, to display their union support "consumers would have to stop ordering sandwiches, baked goods and all meals served or made with bread." The court therefore held that the union's product picketing was unlawful "since the subject matter of the picketing had become so integrated into the food served that to cease purchasing the single item would almost amount to customers stopping all trade with the secondary employer" (*ibid.*).

We disagree with the court below that *American Bread* can be meaningfully distinguished from the instant case on the ground that there the struck goods were "merged" into the retailers' other products and "lost their identity" (Pet. App. A, p. 16a). The Sixth Circuit seemed most influenced by the probable result of the union's activity—"a boycott on all the meals served in the establishments" (411 F.2d at 154)—rather than by the threshold inability of potential customers to order bread-free meals. Furthermore, there can be little reason why the protection afforded by Section 8(b)(4)(ii)(B) to neutrals should differ from one case to another when both the union conduct

and its foreseeable impact on the neutral are the same.[6]

3. The issue of the lawfulness of single product picketing likely to result in a total or near total boycott of the neutral's business is important to the administration of the National Labor Relations Act. The issue has now reached the courts of appeals in several cases, and it recurs frequently before the Board. Indeed, in a half dozen recent cases the Board's decision here has been the basis, in whole or in part, for the issuance of unfair labor practice complaints.[7]

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[6] The court in *American Bread* relied to some extent on *Honolulu Typographical Union No. 37* v. *National Labor Relations Board*, 401 F.2d 952 (C.A.D.C.), which held that the union violated Section 8(b)(4)(ii)(B) when it picketed retail establishments that advertised their products in the pages of a newspaper with which the union was in dispute. Although the court in *Honolulu Typographical* disclaimed any intention of passing on the "single product" issue involved here—which it characterized as "the hard problem posed by the *Tree Fruits* dissenters" (*id.* at 956)—its rationale—that "where picketing means a total boycott" Congress has preferred to protect the neutral's desire to avoid a boycott of his entire business over the union's desire to maximize pressure on the primary employer (*ibid.*)—is inconsistent with the decision below.

[7] *E.g.*, *Millmen-Cabinet Makers Local 550 (Diamond Industries)*, 20-CC-1698, Administrative Law Judge (ALJ) decision issued March 3, 1976, JD-(SF)-50-76; *Local 248, Meat & Allied Workers (Milwaukee Independent Meat Packers Assoc.)*, 30-CC-259, *et al.*, ALJ decision issued February 22, 1976, JD-95-76; *United Auto Workers Local 492 (Nissan Motor Corp.)*, 36-CC-548; *Peter West Datsun*, 31-CC-568; *Truck Drivers Local Union No. 728 (Green's Northwest Liquor Store)*, 10-CC-941; *Local 966, Teamsters Oliveri Photo Labs)*, 29-CC-463.

The case thus involves a significant issue of labor law that has divided the courts of appeals and warrants resolution by this Court.

4. While this case was *sub judice* in the court of appeals, the parent United Steelworkers of America imposed an administratorship upon respondent Local 14055. No possibility of mootness, however, was ever mentioned by the Union in the court of appeals. Following the court's decision the international revoked respondent's charter, and an issue regarding the continuing vitality of this case has now been raised.[8] In our view questions concerning the ongoing *de facto* existence of the Union should be resolved at the compliance stage of this case, see *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U.S. 100, 105-107, and should not bar a determination whether the Board's order is entitled to be enforced. Should the Court disagree with that view, however, then we submit that the Court should grant the petition, vacate the judgment below, and remand the case to the court of appeals with instructions to remand to the Board to pass upon the question of mootness.

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[8] Compare the letter from Carl B. Frankel, United Steelworkers of America (App. A, *infra*), with that of Thomas Canafax, Jr., counsel to the Chamber of Commerce (App. B, *infra*), and that of Robert E. Williams, counsel to the Dow Chemical Company (App. C, *infra*).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

WILLIAM F. SHEEHAN, III,
Assistant to the Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
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National Labor Relations Board.

JUNE 1976.

APPENDIX A

UNITED STEELWORKERS OF AMERICA
AFL-CIO-CLC
Five Gateway Center, Pittsburgh, Pa. 15222

May 18, 1976

Mr. Robert H. Bork
Solicitor General
United States Department of Justice
10th and Constitution Streets
Washington, D.C. 20530

Re: National Labor Relations Board v. Local 14055, United Steelworkers of America, AFL-CIO, et al.

Dear Mr. Bork:

I have been asked to furnish your office with information relating to the dissolution of Local 14055 of the United Steelworkers of America, AFL-CIO and the chances, if any, of its being revived in the future. This information is sought in connection with the preparation of the Solicitor's response to the petitions for certiorari which have been filed by the Dow Chemical Company and the Chamber of Commerce of the United States of America.

First, as your office is aware, the International Executive Board of the United Steelworkers of America voted to cancel Local Union 14055 on or about May 13, 1976. Enclosed you will find President I. W. Abel's letter advising the administrator of the cancellation.

This Local was under administratorship since June of 1975 and the time had now come, in the judgment of the administrator, to terminate its existence entirely. The reason is simple. The only employees in the jurisdiction of Local 14055 were the production and maintenance workers employed by the Dow Chemical Company, Bay Refining Division plant in Bay City, Michigan. The Local commenced a strike against that plant in February of 1972. The strike was not successful, however, and has been abandoned now for more than a year. During the course of the strike, Dow withdrew its recognition of the Union. The National Labor Relations Board ruled in January of 1975 that the Company committed no unfair labor practice when it terminated the bargaining relationship. *Dow Chemical Company*, 216 NLRB No. 16. Accordingly, the Local Union, prior to its dissolution, held no bargaining rights with respect to employees of Dow (or any other employer) nor did it have any prospects for reacquiring such rights in the future. Once claims on the treasury and other details had been resolved, there was no reason to maintain the existence of the Local.

Second, it has been suggested that the Local might possibly be revived in the future as an affiliate of District 50, Allied and Technical Workers of the United States and Canada or possibly as an affiliate of the United Mine Workers of America. A brief review of the somewhat complicated history of these labor organizations shows why that cannot occur.

District 50, Allied and Technical Workers was once a semi-autonomous affiliate of the United Mine Workers of America. The Mine Workers confined its jurisdiction to workers employed in the coal mining industry and related construction work. District 50, on the other hand, was free to organize any employees it saw fit. Local 14055 was one of the constituent locals in District 50.

In March of 1968, District 50 disaffiliated from the United Mine Workers over a basic dispute in policy. Because it had already functioned as a somewhat separate entity within the Mine Workers, District 50 disaffiliated as a unit taking along virtually all its constituent locals. Only a few District 50 locals remained with the Mine Workers because their members were engaged in mine construction work. Following disaffiliation, the two functioned as completely separate labor organizations.

In 1971, District 50 affiliated with the United Steelworkers of America. That affiliation was subject to considerable litigation and was eventually conducted under the supervision of the United States Department of Labor. See, *Cefalo* v. *Moffett*, 333 F. Supp. 1283 (D.C. 1971), *modified on appeal*, 449 F.2d 1193 (D.C. Cir. 1971), *on remand*, —— F. Supp. ——, 67 CCH Labor Cases, ¶ 12,468. With the affiliation, District 50 lost its existence as a separate entity.

In the circumstances, clearly there is no chance that Local 14055 will surface in the future as a local in either District 50 or the United Mine Workers.

District 50 no longer exists and there is no conceivable tie between the Bay Refinery workers and the Mine Workers.

In fact, there is no chance that the Local will surface again at all. Most of the officers of the Local have acquired other jobs. None is currently employed by Dow. At the same time, the current employees of Dow have shown no interest in representation by this Local. From the imposition of the administratorship until the present date, there have been no meetings of the Local either officially or by some members on their own in the form of a "rump" organization. Further, during this period, there has been no picketing activity of any kind. Finally, in April of 1976, this Local did not conduct an election of officers as have all the other local unions in the United Steelworkers of America.

As I understand it, agents of the National Labor Relations Board are now in the process of investigating the facts with regard to this matter. If I can be of any further assistance to you or to them, please let me know.

Sincerely,

/s/ Carl B. Frankel
CARL B. FRANKEL
Assistant General Counsel

CBF/jb

cc: Director Charles Younglove
Staff Representative George Watts

UNITED STEELWORKERS OF AMERICA
AFL-CIO-CLC
Five Gateway Center, Pittsburgh, Pennsylvania 15222

May 13, 1976

Mr. George B. Watts, Staff Representative
United Steelworkers of America
1104 South Madison Avenue
Bay City, Michigan 48706

Dear Sir and Brother:

This is to advise you that the International Executive Board of the United Steelworkers of America, voted to terminate the tenure of the International Administrator and cancel Local Union 14055.

We are enclosing, herewith, Government Reports Form LM-15 (semi-annual) and LM-16 (terminal) to be completed by you. Terminal Trusteeship Financial Report Form LM-2 must be filed together with this report. All reports must be returned to this office, attention Wayne Antrim. This is in accordance with the Labor-Management Reporting and Disclosure Act of 1959.

Sincerely yours,

President

cc: Director Younglove

APPENDIX B

LAW OFFICES
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Telephone (202) 639-8687

May 20, 1976

The Honorable Robert H. Bork
Solicitor General
Department of Justice
Washington, D.C. 20530

Re: Local 14055, United Steelworkers of American v. N.L.R.B. (Chamber of Commerce and Dow Chemical Co., Intervenors) D.C. Cir. No. 74-1632, *cert.* petition pending, Supreme Court No. 75-1609

Dear Solicitor General Bork:

I am counsel for the Chamber of Commerce of the United States of America, a party in the above-cap-

tioned case. I understand that representations have been made by counsel for the United Steelworkers of America that this cause has been mooted by the purported dissolution of Respondent, Local 14055, an affiliated local of the Steelworkers' International organization.

This contention, besides being wholly unsubstantiated is without merit. The circumstances demonstrate that the International Union (United Steelworkers of America) has coopted and is performing all of the institutional functions of Local 14055, such that even if the Local has been dissolved, the International remains as its present successor and *alter ego*. Thus, in July, 1975, the International imposed a trusteeship over the Local, and through George Watts, the trustee appointed by the International, directed and controlled the affairs of the Local. The Trusteeship Report (Form LM-15) required by law to be filed with the Department of Labor, indicates the purpose of the trusteeship to be, "To assure the performance of collective bargaining agreements or other duties of a bargaining representative." In further detail, the reasons therefor were represented as being, "To protect the interests of the local union members and the *International Union, including pending law suits.*" (emphasis supplied). Indeed, in a closely related case, the Court of Appeals for the Sixth Circuit held two staff members of the International, including Trustee George Watts, in civil contempt of its decree[1] which ran against Local

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[1] The Court's decree unofficially reported at 71 CCH Lab. Cas. ¶ 13,619, enforcing the NLRB's order in 198 NLRB 1184.

14055, District 50, on the grounds that this trusteeship was a successor bound by the decree (Civ. Contempt Adjudication No. 72-2105, May 17, 1973).

Pursuant to the avowed purpose of the trusteeship of continuing "pending law suits", the International is currently representing the interests of Local 14055 and of the Local's individual members, in litigation arising out of the same labor dispute which spawned the instant case. In *Dow Chemical Co.* v. *Martin*, C.A. 38644, E.D. Mich., involving the legality of state welfare and unemployment benefits to striking members of Local 14055, the International intervened to represent the interests both of the Local and its members, asserting to the court there:

> "That the United Steel Workers of America, AFL-CIO CLC, is the successor's collective bargaining representative of District 50 [the predecessor affiliated body of Local 14055] and as such, is statutorily empowered to represent the interests of the Dow Chemical employees who were formerly members of District 50 pursuant to the National Labor Relations Act." (Motion to Intervene enclosed herewith.)

In the "Consent" for the International's intervention, which was secured from the other parties and filed with the court, the International similarly asserted that it "is now a labor organization representing Local 14055 . . . and its members", and on that basis requested leave "to intervene in the instant proceeding to represent the interest of members of Local 14055." (Consent enclosed herewith.) Currently, the

International is presently defending that action as an Intervenor-Defendant on behalf of the Local and its members.

Also, the International presently is actively involved in proceedings before the Michigan state courts representing the individual interests of Local 14055 members in establishing their eligibility for unemployment benefits for the period of the strike against Dow.[2]

In sum, the International has effectively taken over the institutional functions of the Local, such as conducting litigation on behalf of its individual members, in which it is currently engaged, and assuming the bargaining role of the Local. In all respects, the International has become the Local's *alter ego* and successor in interest against which the order of the NLRB here may run if sustained by the Supreme Court. Indeed, it is apparent from this Report of Trustee filed with the Department of Labor that one of the reasons the International imposed the Trusteeship upon the Local was to enable it to manage the instant litigation. Having prevailed in the Court of

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[2] Although Local 14055 and the International have lost their majority status in the bargaining unit here (216 NLRB No. 16), that does not render the Local defunct since the International as its *alter ego* may continue to function on a minority representation basis, which it has done for the last 1½ years with respect to defending the interests of individual members in litigation. Moreover, the International still has the opportunity of obtaining judicial review of the NLRB's decision finding that it had lost bargaining status in the unit of Dow employees.

Appeals and won a decision of substantial precedential significance, it cannot at this late hour dissolve the institutional form of the Local (while still carrying on its other essential functions) in order to escape further judicial review.

Moreover, the purported dissolution of Local 14055 is at this point speculative only. Unless the circumstances attendant thereon can be established as of record in an appropriate proceeding with fuli opportunity to cross-examine and to present evidence, the parties here will be deprived of the fundamental elements of fairness and due process. The Courts have repeatedly approved bifurcation of NLRB proceedings leaving the determination of matters such as successorship to a compliance proceeding while proceeding to adjudicate questions of substantive violations. I respectfully suggest that such a procedure is warranted here.

The Chamber, which filed the underlying unfair labor practice charge on behalf of retail merchants subject to the kind of secondary pressure exhibited in this case, has a substantial stake in the resolution of the significant question of law presented. Moreover, the secondary employers involved in this proceeding will remain subject to the same kind of product picketing, possibly even by the International Union.

For these reasons, I do not believe the assertion of mootness should influence the consideration that your office is giving to petitioning the Supreme Court for

certiorari. If we can offer any additional information or be of assistance, I would appreciate hearing from a member of your staff.

Very truly yours,

BOROVSKY, SMETANA, EHRLICH
& KRONENBERG

/s/ Thomas Canafax, Jr.
THOMAS CANAFAX, JR.

TC:gt

cc: John Irving
Norton Come

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 38644

THE DOW CHEMICAL COMPANY and THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, PLAINTIFFS

v.

S. MARTIN TAYLOR, Director of the Michigan Employment Security Commission, and WALTER CAMPBELL, FRANK C. PADZIESKI, ALEX FULLER, RAYMOND C. LYONS and BARRY BROWN, Members of the Michigan Employment Security Commission, DEFENDANTS

PLAINTIFFS' CONSENT TO PERMIT THE UNITED STEELWORKERS OF AMERICA, AFL-CIO CLC TO INTERVENE

1. Whereas the United Steelworkers of America, AFL-CIO CLC has consummated a merger with the Allied Technical Workers, and is therefore now a labor organization representing Local 14055, Allied Technical Workers and its members;

2. Whereas the United Steelworkers of American AFL-CIO CLC, as a result of the aforesaid merger, now has an interest in representing the members in Local 14055 who are employed by The Dow Chemical Company in Bay City, Michigan;

3. Whereas the United Steelworkers of America have moved to intervene in the instant proceeding to

represent the interest of the members of Local 14055;

4. Whereas Plaintiff The Dow Chemical Company, desires a full adversary proceeding in order to present the Court with all the pertinent arguments and points of view.

In consideration of the foregoing facts, Plaintiff The Dow Chemical Company consents and agrees that the United Steelworkers of America, AFL-CIO-CLC, be permitted to intervene in the above captioned matter as defendant-intervenor.

THE DOW CHEMICAL COMPANY

By /s/ Thomas W. Misner
THOMAS W. MISNER
2030 Dow Center
Midland, Michigan 48640

By /s/ Lawrence M. Cohen
LAWRENCE M. COHEN

/s/ Jeffrey S. Goldman
JEFFREY S. GOLDMAN
LEDERER, FOX AND GROVE
111 West Washington Street
Chicago, Illinois 60602

THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF
AMERICA

By /s/ Milton Smith
MILTON SMITH

/s/ O. F. Wenzler
O. F. WENZLER
1615 H Street, N.W.
Washington, D.C. 20006

/s/ Gerard C. Smetana
GERARD C. SMETANA
925 S. Homan Avenue
Chicago, Illinois 60607

Of Counsel:

/s/ Robert J. Finkel
ROBERT J. FINKEL
LEVIN, LEVIN, GARVETT
AND DILL
1250 Penobscott Building
Detroit, Michigan 48226

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action File No. 38644

THE DOW CHEMICAL COMPANY and THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,
PLAINTIFFS

—and—

S. MARTIN TAYLOR, Director of the Michigan Employment Security Commission, and WALTER CAMPBELL, FRANK C. PADZIESKI, ALEX FULLER, RAYMOND M. LYONS and BARRY BROWN, Members of the Michigan Employment Security Commission,
DEFENDANTS

—and—

UNITED STEELWORKERS OF AMERICA, AFL-CIO CLC,
INTERVENORS

MOTION TO INTERVENE

Now come the UNITED STEELWORKERS OF AMERICA, AFL-CIO CLC, by Bernard Kleiman, General Counsel; Carl B. Frankel, Assistant General Counsel; Bredhoff, Barr, Gottesman, Cohen & Peer, Associate General Counsel; and Kasoff, Young, Gottesman, Kovinsky & Friedman, District Counsel; and move to be allowed to intervene as a Party-Defendant in the above entitled proceedings pursuant to Rule 24(a)2 or in the alternative, Rule 24(b)2 of the Federal Rules of Civil Procedure, and in support of said Motion says unto this Honorable Court as follows:

(1) The Plaintiffs have instituted an action in this Honorable Court wherein they are attempting to have this Court disallow benefits received by employees of the Dow Chemical Company pursuant to the Michigan Employment Security Act, the rules and regulations of the Michigan Employment Security Commission, and the Judicial Decisions of the Michigan Supreme Court.

(2) The Plaintiffs admit in Paragraph 11 of their factual allegations in their Complaint that none of the employees who have received or may receive unemployment benefits have been made parties to this action.

(3) The employees herein above referred to were formerly members of International Union District 50, United Mineworkers of America.

(4) That District 50 and the United Steelworkers of America, AFL-CIO CLC jointly agreed upon a merger of the two international unions and that said merger has now been effectuated by virtue of a referendum vote, which was run under the auspices of the United States Government and the jurisdiction of the United States Courts and that said referendum vote has now been approved by the United States District Court.

(5) That the United Steelworkers of America, AFL-CIO CLC, is the successor collective bargaining representative of District 50 and as such, is statutorily empowered to represent the interests of the Dow Chemical employees who were former members of District 50 pursuant to the National Labor Relations Act.

(6) That the United Steelworkers of America, AFL-CIO CLC, have an interest relating to the property or transaction which is the subject of the action instituted by the Plaintiffs and further, that the United Steelworkers of America, AFL-CIO CLC, is so situated that the disposition of this action may as a practical matter impede and/or impair the ability of the United Steelworkers to protect the interests of the individual employees who have not been made parties to this action.

(7) That neither the Plaintiffs nor the Defendants in this action can effectively and adequately represent the interests of the individual employees and/or the United Steelworkers of America, AFL-CIO CLC.

(8) That if allowed to intervene, the United Steelworkers of America, AFL-CIO CLC, will raise common questions of fact and law in their defense of this action which have previously been raised by the pleadings heretofore filed.

(9) That attached hereto is a pleading entitled Motion to Dismiss, which the Interveners will file and will support with a brief if allowed to become a Party-Defendant in this action. Moreover, for purposes of this pleading, in addition to the Motion to Dismiss, the Interveners will rely upon the conclusions reached and the case law cited in the brief heretofore filed in support of the Motion to Dismiss by the Attorney General of the State of Michigan.

WHEREFORE, United Steelworkers of America, AFL-CIO CLC, prays that upon hearing of this Motion, this Honorable Court enter an Order allowing

it to intervene as a Party-Defendant in the above entitled proceedings.

BERNARD KLEIMAN
General Counsel
United Steelworkers of America, AFL-CIO
10 South LaSalle Street
Suite 452
Chicago, Illinois 60603

CARL B. FRANKEL
Assistant General Counsel
United Steelworkers of America, AFL-CIO
1500 Commonwealth Building
Pittsburg, Pennsylvania

BREDHOFF, BARR, GOTTESMAN, COHEN & PEER
Associate General Counsel
United Steelworkers of America, AFL-CIO
1000 Connecticut Avenue, N.W.
Washington, D. C. 20036

KASOFF, YOUNG, GOTTESMAN, KOVINSKY & FRIEDMAN
District Counsel
United Steelworkers of America, AFL-CIO
2430 First National Building
Detroit, Michigan 48226
Telephone: 961-1410

By _____
ALLEN J. KOVINSKY

Dated: August 21, 1972

L[illegible]r-Management Reporting and Disclosure

Form approved.
Bureau of the Budget No. 44-R1165.

TRUSTEESHIP REPORT FORM LM–15

READ INSTRUCTIONS CAREFULLY BEFORE PREPARING REPORT—FILE TWO COPIES

Office of Labor-Management and Welfare-Pension Reports
U.S. Department of Labor
Washington, D.C. 20210

1. Type of Report:
☒ Initial (Complete both sides)
☐ SEMIANNUAL FOR PERIOD ENDING: Month 6 | Day 9 | Year 75

2. LM File No. 006155

3. Date Trusteeship Established 6/9/75

4. Full name and address of reporting labor organization which has assumed trusteeship, include ZIP Code

United Steelworkers of America
5 Gateway Center
Pittsburgh, Penna. 15222

5A. Full name and address of subordinate labor organization held in trusteeship, include ZIP Code
Local Union 14055, District 29
George B. Watts, Trustee

5B. City and State where organization under trusteeship is chartered to operate
1104 S. Madison Avenue
Bay City, Michigan 48706

6. Any other address where records necessary to verify this report are kept, include ZIP Code

7A. Check applicable reasons for establishing or continuing the trusteeship
☐ A. To correct corruption or financial malpractice
☒ B. To assure the performance of collective bargaining agreements or other duties of a bargaining representative
☐ C. To restore democratic procedures
☐ D. Other (Specify) _____

7B. List provision(s) of constitution which specifically authorizes imposition of trusteeship
Article IX

8. Give detailed statement which explains each reason checked above. If additional space is needed, attach sheets to this report. (See instructions)

Request an Administrator be placed over the Dow Chemical Company, (Bay Petro Plant) Bay City, Michigan, Local Union 14055. Recommend George B. Watts be appointed Administrator over Local Union 14055, to protect the interests of the Local Union members and the International Union, including pending law suits.

BEST COPY AVAILABLE

9. During the period covered by this report, (A) was there a convention or other policy-determining body to which the subordinate labor organization sent delegates or would have sent delegates if not in trusteeship, or (B) was there an election of the officers of the labor organization assuming the trusteeship?

(A) ☐ Yes ☒ No. If the answer to either (A) or (B) is "Yes," complete Part A or B as applicable, of the schedule on selection of delegates and officers, Form LM–15A, which is included in this packet, and attach to this report.
(B) ☐ Yes ☒ No.

VERIFICATION AND SIGNATURE

Each of the undersigned authorized officers of the labor organization assuming the trusteeship declares, under penalty of law, that all of the information in this report, including the attachments incorporated therein or referred to in any part of this report, has been examined by him and is, to the best of his knowledge and belief, true, correct and complete.

Signature of president of labor organization assuming trusteeship (if other title, cross out and write in correct title.)
I. [illegible] Abel

Where and when signed (City and State) Palm Ga. (Date) 7/10/75

Signature of treasurer of labor organization assuming trusteeship (if other title cross out and write in correct title.)
R. Burke Dunks

Where and when signed (City and State) Palm Ga. (Date) 7/10/75

Signature of trustee of subordinate labor organization (if other title, cross out and write in correct title.)
/ George B. Watts 6/19/75

Where and when signed (City and State) Bay City Mi 48706 (Date) 6/19/75

Signature of trustee of subordinate labor organization (if other title, cross out and write in correct title.)

Where and when signed (City and State)

Labor - Management Services Administration
STAT
JUL 15 1975
AM (Date) PM
7,8,9,10,11,12,1,2,3,4,5,6

19a

COMPLETE FOR INITIAL REPORT ONLY

STATEMENT OF ASSETS AND LIABILITIES

Item No.	LM-2 Item	Assets—As of Date Trusteeship Imposed	Sch.	Amount	Item No.	LM-2 Item	Liabilities—As of Date Trusteeship Imposed	Sch.	Amount
10	19	Cash on hand		$ 43 309	20	29	Accounts payable		$
11	20	Cash in banks			21	30	Loans payable	6	
12	21	Accounts receivable			22	31	Mortgages payable		
13	22	Loans receivable	1		23	32	Other liabilities	4	None
14	23	U.S. Treasury securities			24	33	TOTAL LIABILITIES		$ None
15	24	Mortgage investments							
16	25	Other investments	2	700					
17	26	Fixed assets	5				NET ASSETS		
18	27	Other assets	3						
19	28	TOTAL ASSETS		$ 44 009	25	34	Net assets (Item 19 less Item 24)		$ 44 009

SCHEDULE 1—LOANS RECEIVABLE (See Instructions, Item 13)

	Name of Officer, Employee, Member or Business Enterprise (A)	Purpose of Loan, Security, if any, and Arrangement for Repayment (B)	Amount (C)
1.			$
2.			
3.			
4. Total additional listings, if any			
5. Total loans not listed above			
6. Totals of lines 1 through 5			$

SCHEDULE 2—OTHER INVESTMENTS (See Instructions, Item 16)

Description (A)	Amount (B)
Marketable securities:	
1. Total cost	$
2. Total book value	
3. Itemize each marketable security holding over $1,000 where book value exceeds 20 percent of the total on line 2 above.	
(a)	
(b)	
Other investments:	
4. Total cost	
5. Total book value	
6. Itemize each other investment holding over $1,000 where book value exceeds 20 percent of the total on line 5 above.	
(a)	
(b)	
7. Total of lines 2 and 5	$

SCHEDULE 3—OTHER ASSETS (See Instructions, Item 18)

Description (A)	Book Value (B)
1.	$
2.	
3.	
4.	
5. Total of lines 1 through 4	$

SCHEDULE 4—OTHER LIABILITIES (See Instructions, Item 23)

Description (A)	Amount (B)
1.	$
2.	
3.	
4.	
5.	
6.	
7. Total of lines 1 through 6	$

SCHEDULE 5—FIXED ASSETS (See Instructions, Item 17)

Description (A)	Cost or Other Basis (B)	Total Depreciation (if any) (C)	Book Value (D)
1. Land (Give location):	$		$
2. Buildings (Give location):		$	
3. Automotive equipment			
4. Office furniture and equipment			
5. Other fixed assets			
6. Totals of lines 1 through 5	$	$	$

SCHEDULE 6—LOANS PAYABLE (See Instructions, Item 21)

Source (A)	Arrangements for Repayment (B)	Amount (C)
1.		$
2.		
3. Total from additional listings, if any		
4. Totals of lines 1 through 3		$

APPENDIX C

LAW OFFICES
KENNETH C. MCGUINESS
Suite 1250
1747 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

Robert E. Williams

202 296-0333

June 15, 1976

The Honorable
Robert H. Bork
Solicitor General
Department of Justice
Washington, D. C. 20530

Re: National Labor Relations Board v. Local 14055, United Steelworkers of America, AFL-CIO, *et al.*, U. S. Supreme Court, No. A-930

Dear Mr. Bork:

I am counsel for The Dow Chemical Company, which was the original charging party in the unfair labor practice proceeding involved in the case referenced above, in connection with Dow's petition for certiorari, docket number 75-1521.

I have been made aware that counsel who represented the respondent union in the proceedings below has suggested that certain organizational changes, including the apparent revocation of the charter of

the local union, may raise a question of mootness. Presenting legal argument on the doctrine of mootness is not my immediate purpose, although I should clearly note that even if these representations were taken at face value we would contend that the Court would not thereby be deprived of its judicial power to resolve the controversy involved in the case.

My immediate concern is that you understand that many of the original strike participants continue to this day to remain in the status of strikers, regardless of any alteration in the organizational form. At no time has an unconditional offer to return to work or to cease picket activity been made. In 1973 an offer to return to work was made, but it was explicitly subject to the condition that Dow agree to immediately restore each and every striker to the exact position which he occupied prior to the strike, a condition which would have required Dow to discharge other employees to whom Dow had promised permanent employment as replacements for the strikers. Clearly Dow was under no obligation to yield to this demand. See *N.L.R.B.* v. *McKay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938). Those strikers who personally appeared in a group to present this conditional offer were specifically asked if they wished to make an unconditional offer to return to work, and all declined to do so at that time.

Since Dow would not agree to the condition attached to the 1973 offer to return to work, the strikers continued in their status as such, and no one purporting to speak for the strikers as a group has since

communicated any further offer, either conditional or unconditional, to abandon the strike and return to work.

Many strikers have individually abandoned the strike from time to time. In April of 1976, for example, four individuals abandoned the strike: one by returning to work; one by resigning; and two by retiring. In May of 1976 one individual abandoned the strike by making an unconditional offer to return to work. A substantial number have persisted in carrying on the strike, however. As of this date, some twenty-three of the original participants remain on strike. It is possible that some of these may have abandoned any continuing interest in returning to work for Dow without formally resigning; however ten of the twenty-three have vested pension rights and know that upon leaving Dow they should indicate the manner in which they desire to exercise these rights. One of the strikers who has not yet offered to return to work recently contacted the company to make an inquiry about pension benefits and in the course of that contact made it quite clear that he had no intention of resigning and wished his status to remain unchanged.

On the basis of all the information available to Dow, we must conclude that while the strike has steadily diminished in vigor and success, it has yet to end, and this fact, as well as the other factors suggested to your office by the Chamber of Commerce, should be considered in evaluating any contention that the case has become moot. Although an end to

the strike, should it occur during the pendency of the litigation, would not render the case moot, the continuation of the strike is a most cogent illustration of the practical necessity to secure enforcement of the Board's order to deter any resumption of illegal secondary activity in furtherance of the strike.

Very truly yours,

/s/ Robert E. Williams
ROBERT E. WILLIAMS
Attorney for
The Dow Chemical Company

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 213724 270